

1 Muriel B. Kaplan, Esq. (SBN 124607)
2 Michele R. Stafford, Esq. (SBN 172509)
3 SALTZMAN & JOHNSON LAW CORPORATION
4 120 Howard Street, Suite 520
5 San Francisco, CA 94105
6 (415) 882-7900
7 (415) 882-9287—Facsimile
8 mkaplan@sjlawcorp.com
9 mstafford@sjlawcorp.com

10 Attorneys for Plaintiffs

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1 GIL CROSTHWAITE, RUSS BURNS, in their
2 respective capacities as Trustees of the
3 OPERATING ENGINEERS HEALTH AND
4 WELFARE TRUST FUND FOR NORTHERN
5 CALIFORNIA; PENSION TRUST FUND
6 FOR OPERATING ENGINEERS;
7 PENSIONED OPERATING ENGINEERS
8 HEALTH AND WELFARE FUND;
9 OPERATING ENGINEERS AND
10 PARTICIPATING EMPLOYERS PRE-
11 APPRENTICESHIP, APPRENTICE AND
12 JOURNEYMEN AFFIRMATIVE ACTION
13 TRAINING FUND; OPERATING
14 ENGINEERS VACATION AND HOLIDAY
15 PLAN; OPERATING ENGINEERS
16 CONTRACT ADMINISTRATION TRUST
17 FUND; OPERATING ENGINEERS MARKET
18 PRESERVATION TRUST FUND;
19 OPERATING ENGINEERS INDUSTRY
20 STABILIZATION TRUST FUND; BUSINESS
21 DEVELOPMENT TRUST FUND; AND
22 HEAVY AND HIGHWAY COMMITTEE,

Case No.: C07-4995 JL

COMPLAINT TO COMPEL AUDIT

Plaintiffs,

v.

DUN ENGINEERING SERVICES, INC., a
California Corporation and MARK THOMAS
JONES, an Individual,

Defendants.

1
Parties

2 1. The Operating Engineers Health and Welfare Trust Fund for Northern California;
3 Pension Trust Fund for Operating Engineers (which includes the Pension Plan for the Pension
4 Trust Fund for Operating Engineers, and the Operating Engineers Annuity Plan); Pensioned
5 Operating Engineers Health and Welfare Fund; Operating Engineers and Participating Employers
6 Pre-Apprenticeship; Apprentice and Journeyman Affirmative Action Training Fund; and
7 Operating Engineers Vacation and Holiday Plan are employee benefit plans as defined in the
8 Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3). They
9 and their fiduciaries are together referred to herein as "ERISA Plaintiffs." Gil Crosthwaite and Russ
10 Burns are Co-Chairmen of the Joint Boards of Trustees of the ERISA Plaintiffs with authority to
11 act on behalf of all Trustees.

12 2. Operating Engineers Local Union No. 3 of the International Union of Operating
13 Engineers, AFL-CIO (Union) is a labor organization as defined in § 2(5) of the National Labor
14 Relations Act ("NLRA"), 29 U.S.C. § 152(5).

15 3. DUN ENGINEERING SERVICES, INC. (Dun) and MARK THOMAS JONES
16 (Jones) are employers by virtue of ERISA § 3(5), 29 U.S.C. § 1002(5), and NLRA § 2(2), 29
17 U.S.C. § 152(2), and Mark Thomas Jones personally guaranteed payment of fringe benefits. They
18 are referred to herein as "Defendants".

21
22
Jurisdiction

23 4. Jurisdiction exists in this Court over the claims asserted by the ERISA Plaintiffs by
24 virtue of ERISA § 502, 29 U.S.C. § 1132, in that the ERISA Plaintiffs seek to enforce the
25 provisions of ERISA and the terms of their plans, seek to enjoin the acts and practices which
26 violate ERISA, seek equitable relief to redress such violations, and seek all other appropriate relief
27 under ERISA.

5. Jurisdiction exists in this Court over all the claims by virtue of Labor Management Relations Act ("LMRA") § 301, 29 U.S.C. § 185, in that the plaintiffs seek to enforce the terms and conditions of a collective bargaining agreement between the employer and a labor organization.

6. To the extent jurisdiction over any claim does not exist under ERISA or the LMRA, supplemental jurisdiction exists in this Court over such claims by virtue of 29 U.S.C. § 1367 in that they arise out of a common nucleus of operative facts that form the basis of the federal claims asserted herein, each of which has a substantial ground in federal jurisdiction.

Venue

7. Venue exists in this Court with respect to the claims under ERISA § 502 because all of the plans of the ERISA Plaintiffs are administered within this district and the breach took place in this district.

8. Venue exists in this Court with respect to the claims under LMRA §301(a) because this Court has jurisdiction over the parties, as the Union maintains its principal place of business in this district, its duly authorized officers or agents are engaged in representing employee members in this district, and the claims arise in this district.

Intradistrict Assignment

9. The basis for assignment of this action to this court's San Francisco Division is that all of the events and omissions giving rise to plaintiffs' claims occurred in the County of San Francisco, where the ERISA Plaintiff funds and union dues, were administered during the period claimed herein, and where defendants therefore failed to fulfill its statutory and contractual obligations to the plaintiffs.

111

111

Bargaining Agreement

2 10. The Union and defendants entered into a collective bargaining agreements
3 requiring employer contributions to the Plaintiff Funds, and to the Union for union dues and to
4 other Trust Funds more fully described in the Master Agreement between the Union and the
5 Associated General Contractors of California, Inc., which is incorporated into the Independent
6 Northern California Construction Agreement, and into the Private Work Agreement for Fresno
7 Area ('Fresno'), to which Dun is signatory. That Agreement is referred to herein as the "Bargaining
8 Agreement," and the ERISA Plaintiffs and Trust Funds are third party beneficiaries of those
9 Bargaining Agreements.
10

11 11. The Operating Engineers Market Preservation Fund, Operating Engineers Industry
12 Stabilization Trust Fund, Business Development Trust Fund, and Heavy and Highway Committee,
13 together referred to herein as "Trust Funds," are funds for which plaintiff Boards of Trustees are the
14 assignees of monies due under the Bargaining Agreement.
15

16 12. MARK THOMAS JONES is a guarantor for plaintiffs' claim, pursuant to the terms
17 of the Independent Northern California Construction Agreement.

18 13. Under the terms of said Bargaining Agreements and of the governing documents of
19 the ERISA Plaintiffs which documents are incorporated into the Bargaining Agreement and made
20 binding on defendants, defendants are required to submit monthly reports of hours worked by its
21 employees, and to regularly pay to the Plaintiff ERISA Funds, to the Union for union dues, and to
22 the Trust Funds, certain sums of money, the amounts of which are determined by the hours
23 worked by employees of defendants, all as more fully set forth in said Bargaining Agreement.
24 Also under the terms of said Bargaining Agreement and the governing documents of the Plaintiff
25 Funds, defendants agreed to pay liquidated damages for each delinquent payment, which become
26 part of the contributions. Defendants further agreed to pay interest on the combined contributions
27

1 and liquidated damages at the rates set by the Bargaining Agreements, from the day immediately
2 following the date that each such payment became due until paid in full, all as more fully set forth
3 or incorporated into said Bargaining Agreements.

4 14. Under the terms of said Bargaining Agreements and of the governing documents of
5 the ERISA Plaintiffs which documents are incorporated into the Bargaining Agreements and made
6 binding on defendants, defendants are required to permit an authorized Trust Fund representative
7 to examine such records of defendants as is necessary to determine whether defendants have made
8 full payment of all sums owed to the Plaintiffs, all as more fully set forth in said governing
9 documents, as amended, and incorporated into the Bargaining Agreements.
10

Facts

12 15. On several occasions, written demands were made on defendants on behalf of
13 plaintiffs, to schedule an audit and provide records for examination pursuant to the terms of the
14 Collective Bargaining Agreements and the governing documents of the ERISA Plaintiffs, for the
15 period January 1, 2004 through date of audit.
16

17 16. Defendants have refused and continue to refuse to provide records and to permit an
18 authorized representative of the Plaintiffs to examine defendants' records as are necessary to
19 determine whether defendants have made full payment of all sums owed to the plaintiffs for the
20 period January 1, 2004 through date of audit.

22 17. Defendants have a statutory duty to make required payments timely to the ERISA
23 Plaintiffs under ERISA § 515, 29 U.S.C. § 1145.

24 18. Defendants' failure and refusal to provide records and to permit examination of its
25 records as alleged herein to determine if defendants have met their obligations was at all times,
26 and still is, willful. Defendants continue to breach said Bargaining Agreements, and the governing
27 documents of the ERISA Plaintiffs which documents are incorporated into the Bargaining

1 Agreements and made binding on defendants, by failing to permit examination of its records as
2 alleged. Said refusal is unjustified and done with malicious intent.

3 19. Defendants have a contractual duty under the Bargaining Agreements to timely
4 make required contributions, liquidated damages and interest to the ERISA Plaintiffs and the
5 Funds, and to timely make the required payment of union dues to the Union. Defendants failed to
6 make timely contributions for the periods August 2001-December 2001, December 2002-January
7 2003, June 2003, August 2004-September 2004, and December 2003-July 2007. By failing to
8 make such timely payments as required, defendants have breached said duty, incurring liquidated
9 damages and interest, which defendants have failed and refused to pay.
10

11 20. Plaintiffs are without an adequate remedy at law and will suffer continuing and
12 irreparable injury, loss and damage unless defendants are ordered specifically to perform all
13 obligations required on defendants' part to be performed under ERISA, 29 U.S.C. §§ 1101-1381,
14 the LMRA, 29 U.S.C. §§ 141-197, the Bargaining Agreements, and the governing documents of
15 the Plaintiffs Funds referred to therein, and are restrained from continuing to refuse to perform as
16 required thereunder.
17

18 21. This Court is authorized to issue injunctive relief based on traditional standard. As
19 set forth above, plaintiffs have a strong likelihood of success on the merits, there is the possibility
20 that the Board of Trustees and the participants will suffer irreparable injuries, and the balance of
21 hardships and advancement of public interest favor plaintiffs.
22

Prayer

WHEREFORE, Plaintiffs pray as follows:

25 1. For an order requiring defendants to provide certain records and to submit to an
26 audit of such records by a date certain for the period January 1, 2004 through date of audit; and

27

2. For judgment against defendants in favor of the ERISA Plaintiffs and the Union, in an amount equal to:

a. Any unpaid contributions, due at time of Judgment, including any contributions determined as due by said audit of defendants' records for the period January 1, 2004 through date of audit pursuant to ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A);

(1) To the ERISA Plaintiffs, in accordance with ERISA Section 502(g)(2)(A), 29 U.S.C. Section 1132(g)(2)(A) and the Bargaining Agreements;

(2) To the Union, in accordance with the Bargaining Agreements;

b. Liquidated damages in an amount equal to the greater of:

(1) Interest on the unpaid contributions, or

(2) Liquidated damages provided for under the Bargaining Agreements and unpaid and late paid contributions, in accordance with the Bargaining Agreements of the ERISA Plaintiffs, and with respect to the ERISA Section 502(g)(2), 29 U.S.C. Section 1132(g)(2).

c. Interest on any unpaid and late paid contributions and dues, and on liquidated damages, at the rates and in accordance with the Bargaining Agreements, the governing documents of the ERISA Plaintiffs, ERISA Section 502(g)(2)(B), 29 U.S.C. Section 1132(g)(2)(B), with respect to the ERISA Plaintiffs, and the applicable legal rate with respect to dues and where otherwise appropriate.

3. For any additional contributions and dues payable to plaintiffs and the Bargained
Plans as third party beneficiaries of the Bargaining Agreements at time of judgment, plus interest
and liquidated damages as above provided and in accordance with the Bargaining Agreements, the
governing documents of the ERISA Plaintiffs and, with respect to the ERISA Plaintiffs, ERISA
Section 502(g)(2), 29 U.S.C. Section 1132(g)(2).

4. ERISA Plaintiffs' reasonable attorneys' fees and costs of this action in accordance with ERISA § 502(g)(2)(D), 29 U.S.C. § 1132(g)(2)(D); and in accordance with the collective bargaining agreements for all Bargained Plans, and with LMRA Section 301, 29 U.S.C. § 185 for all plaintiffs.

5. For an order,

(a) requiring that defendants comply with their obligations to plaintiffs under the terms of the Bargaining Agreements and the governing documents referred to therein;

9 (b) enjoining defendants from violating the terms of those documents and of
10 ERISA; and

5. That the Court retain jurisdiction of this case pending compliance with its orders.

16 6. For such other and further relief as the Court may deem just and proper.

17
18 Dated: September 25, 2007 SALTZMAN & JOHNSON LAW CORPORATION

By: _____ /s/ _____
Muriel B. Kaplan
Attorneys for Plaintiffs